

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 108820
v.	:	
	:	
JAMES L. WAVER,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 30, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR- 97-351032-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Tasha L. Forchione, Assistant Prosecuting Attorney, *for appellee*.

James L. Waver, *pro se*.

MARY EILEEN KILBANE, J.:

{¶ 1} Defendant-appellant, James Waver (“Waver”), appeals from a Cuyahoga County Court of Common Pleas order denying his application for DNA

testing pursuant to R.C. 2953.71, et seq. For the reasons that follow, we affirm the decision of the trial court.

{¶ 2} On January 12, 1998, Waver was convicted of two counts of rape, each with sexually violent predator specifications, and one count of felonious assault with a sexual motivation specification.

{¶ 3} Also on January 12, 1998, the court sentenced Waver to a prison term of ten years to life on both rape counts and a prison term of eight years on the felonious assault count. All three counts were to run consecutively.

{¶ 4} Waver challenged the judgment of the court on his direct appeal; we affirmed his conviction but remanded the matter to the trial court for resentencing so that Waver had an opportunity for allocution. *State v. Waver*, 8th Dist. Cuyahoga No. 73976, 1999 Ohio App. LEXIS 3860 (Aug. 19, 1999) (“*Waver 1*”).

{¶ 5} On September 16, 1999, the trial court granted Waver an opportunity to speak and then resentenced him to a prison term of ten years on both rape counts and a prison term of eight years on the felonious assault count with a maximum prison term of life imprisonment. All counts were to be served consecutively.

{¶ 6} Waver filed an application for reopening, which this court denied on August 28, 2000. *State v. Waver*, 8th Dist. Cuyahoga No. 73976, 2000 Ohio App. LEXIS 3921 (Aug. 28, 2000) (“*Waver 2*”). Thereafter, Waver sought relief in the Ohio Supreme Court. The Ohio Supreme Court denied his motion for leave to file a delayed appeal and dismissed the matter. *State v. Waver*, 106 Ohio St.3d 1408, 2005-Ohio-3154, 830 N.E.2d 342 (“*Waver 3*”).

{¶ 7} On April 14, 2016, Waver filed an application for DNA testing. He requested that three items be tested: 1) black pants collected at the crime scene with two blood stains on the pants leg, 2) a “ratchet tool” used to assault the victim, (“Jane Doe”), and 3) the rape kit.

{¶ 8} On June 20, 2017, Waver filed a motion for leave to amend/supplement his April 14, 2016 application for DNA testing.

{¶ 9} On July 27, 2017, the trial court denied Waver’s application. The court’s journal entry stated “[m]otion for DNA testing is denied. It is both unnecessary and irrelevant to the violent acts committed.” On August 2, 2017, the court denied Waver’s motion for leave to amend/supplement his application for DNA testing.

{¶ 10} On July 2, 2018, Waver filed a motion for relief from judgment pursuant to Civ.R. 60(B)(5), which the trial court denied on July 6, 2018. Waver appealed that decision to this court, and we affirmed the judgment of the lower court. *State v. Waver*, 8th Dist. Cuyahoga No. 107502, 2019-Ohio-1444 (“*Waver 4*”). Waver did not appeal the denial of his application for DNA testing at that time. He does so now.

{¶ 11} Before us is Waver’s appeal regarding the denial of his application for DNA testing and the denial of his motion to amend/supplement his application. He presents three assignments of error for our review.

Assignment of Error Number One

The trial court erred in denying DNA testing to appellant because the statute contemplates testing given the advances in DNA technology since his trial as R.C. 2953.74(A) required.

Assignment of Error Number Two

The trial court erred by denying results of a new DNA test would not be outcome determinative as R.C. 2953.74(B) required when test results could reveal the absence of appellant's DNA and the simultaneous presence of another felon's DNA.

Assignment of Error Number Three

The trial court erred in denying motion for leave to amend/supplement application for newly discovered evidence and advance in DNA testing required by R.C. 2953.74(A), R.C. 2953.71(U), R.C. 2953.23(A)(2), R.C. 2953.73(C)(3)(4), and R.C. 2953.74(D).

{¶ 12} We adopt the facts as they were summarized in our opinion in his direct appeal in *Waver 1. Waver*, 8th Dist. Cuyahoga No. 73976, 1999 Ohio App. LEXIS 3860 (Aug. 19, 1999). Especially relevant to this appeal is the relationship between Jane Doe and Waver and the testing done during the investigation.

{¶ 13} Jane Doe and Waver had lived on and off with each other for ten years, often as a couple. Jane Doe has five children; Waver fathered the youngest two. At the time of the rape, Waver and Jane Doe also worked together at a temporary staffing agency.

{¶ 14} Jane Doe reported the rape immediately; Waver was the only suspect throughout the course of the investigation. At trial, the major issue for the jury was not who had committed the rape and the assault, but whether Waver's actions rose

to the statutory level of a rape and a felonious assault. As a result, identity was never an issue at trial.

{¶ 15} The rape kit of Jane Doe was initially tested on May 9, 1997, with the following results:

- 1) Stain on skin: positive blood
- 2) Rectal Swab: positive blood
- 3) Saliva samples, oral swabs, vaginal swabs, swabs in medium: negative semen and blood
- 4) Oral, rectal, and vaginal slides: negative spermatozoa

{¶ 16} During the course of the investigation, both the black pants and the ratchet tool were also tested. The black pants had stains that tested positive for human blood. The ratchet tool tested negative for both semen and blood.

{¶ 17} Fingernail scrapings from Jane Doe were obtained but were not tested because the necessary technology did not exist.

{¶ 18} Waver now argues that the trial court erred in denying his application because prior DNA tests were not “definitive DNA tests”; he argues that advances in testing could be used to test Jane Doe’s fingernail scrapings and exonerate him. For the reasons that follow, we disagree with Waver and affirm the decisions of the trial court.

{¶ 19} We will address all of his assignments of error together because they present the same issue.

Law and Analysis

{¶ 20} Postconviction DNA testing for eligible inmates is addressed in R.C. 2953.71 through 2953.81; detailed grounds for accepting or rejecting applications

can be found in R.C. 2953.74. *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 114. R.C. 2953.74(A) provides that a trial court “has the discretion, on a case-by-case basis” to accept or reject an eligible inmate’s application for DNA testing. Thus, we review the trial court’s decision to deny Williamson’s application for an abuse of discretion. An abuse of discretion is more than an error of law or judgment, but instead connotes that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶ 21} In reviewing the trial court’s decision, we are cognizant that a court may accept an R.C. 2953.73 application for DNA testing *only* if it determines that six conditions apply. *State v. Bonnell*, 155 Ohio St.3d 176, 2018-Ohio-4069, 119 N.E.3d 1285. Of particular relevance to this case is the third condition.

{¶ 22} R.C. 2953.74(C) provides, in part, that the court may accept an application for DNA testing only if:

(3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.

{¶ 23} There is no identity issue in this case; Jane Doe testified that it was Waver who raped and assaulted her and, given their extensive history and the facts of the case, a mistake in identity is unlikely in the extreme. Where identity is not at

issue, we have found that further tests are not required because they would not change the outcome of the case. *State v. Williamson*, 8th Dist. Cuyahoga No. 106480, 2018-Ohio-2226.

{¶ 24} In *Williamson*, we held that, even if DNA from another person was found, “Williamson would not be completely exonerated because the victim testified he raped her over 40 times. Williamson’s identity was not at issue; he denied raping the victim but was convicted of 12 counts of rape.” *Id.* at ¶ 11

{¶ 25} Here, Waver denied raping and assaulting the victim. He points to Jane Doe’s drug use and that she was unconscious during portions of the assault. However, as in *Williamson*, the defense’s evidence and arguments were presented to the jury. As in *Williamson*, the major issue was not who attacked Jane Doe; the major issue was whether the defendant’s actions were crimes. And, as in *Williamson*, the defendant was convicted.

{¶ 26} Waver relies on two cases to bolster his arguments, but in both instances, identity was the major issue at trial. He cites *State v. King*, 8th Dist. Cuyahoga Nos. 103947, 103948, and 103949, 2017-Ohio-181 and *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.). These cases are distinguishable.

{¶ 27} In *King*, we concluded that the trial court abused its discretion in denying the defendant’s request for additional testing. However, in that case, the victim was raped and murdered and there was unknown male DNA found on her body. The evidence in *King* suggested that the unknown male was the person who

had raped and murdered the victim, not the defendant. Further, because it was a murder case, the victim was unable to identify her attacker.

{¶ 28} In *Ayers*, another murder case, we also found that the court abused its discretion in denying the application. Identity was again at issue. Much like in *King*, there was biological material found on the victim that was tested and found not to be from the defendant. There were also fingernail scrapings that could not have been tested at the time of the crime because the required technology did not exist. We found that the court should have allowed the DNA test to go forward because the results from new technology could prove critical.

{¶ 29} As in *Ayers*, there are fingernail scrapings in this case that could be tested now because of advances in technology. Unlike in *Ayers*, there is no other evidence that suggests another individual is responsible for the crimes Waver was convicted of committing. As the trial court stated below, new testing would be unnecessary and irrelevant to the crimes committed. Identity is not at issue in this case. As a result, we find that the trial court did not abuse its discretion.

Res Judicata

{¶ 30} Waver's claims are also barred by res judicata.

{¶ 31} This is Waver's second appeal regarding the denial of his application for DNA testing. In *Waver 4*, as referenced above, Waver did not pursue the appropriate remedy; his motion for relief from judgment from the denial of his application was improper. *Waver*, 8th Dist. Cuyahoga No. 107502, 2019-Ohio-1444. During that appeal we remarked that, pursuant to App.R. 3(D), "Appellant

did not designate the trial court's July 31, 2017 judgment denying his application for DNA testing in his notice of appeal, and thus, the propriety of that judgment is not properly before this court at this time." *Id.* at ¶ 44. As we implied, Waver should have appealed the denial of his application then rather than pursue the issue on appeal now.

{¶ 32} Res judicata prevents relief on successive petitions for postconviction relief that raise issues that were or could have been raised in the original petition. *State v. Mack*, 8th Dist. Cuyahoga No. 101261, 2018-Ohio-301, ¶ 15. Here, Waver presented a petition for postconviction relief in his motion for relief from judgment that was the subject of *Waver 4*. That motion could have raised the issue of whether his application for DNA testing was properly denied. Instead, Waver waited until this successive petition to raise the issues; his claims are barred by res judicata as a result.

{¶ 33} For the foregoing reasons, we overrule Waver's three assignments of error. The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

EILEEN T. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR